When Can a Nonconforming Use be Made Less Nonconforming?

Mon 4/27/2015 2:55 PM

To Bernie, Justin, and anyone else interested in nonconforming uses,

I was hoping to continue the discussion on nonconforming uses, but with a slight change. We are attempting to answer a question here in Manchester about the reduction, not expansion, of a dimensional nonconformity. The hypothetical fact pattern is that someone with a nonconforming structure in a setback, maybe a building or a deck, wants to knock down the structure and rebuild it, but rebuild it in a more conforming manner. Maybe the deck would be rebuilt to only 5 feet into the setback instead of 10, or maybe the building would be moved to a more conforming, but not completely conforming, place on the lot.

From a practical perspective, it seems that any town would welcome the chance to reduce the nonconformity and would grant the building permit. That seems to conflict with the rationale of nonconforming uses, however, since nonconforming uses (including dimensional nonconformities that are not "uses") are intended to protect a property owner's reasonable, investment-backed expectations that were in existence when the applicable provision of the ordinance was enacted. For instance, the owner of a nonconforming factory in a residential district does not have the right to change the use to a nonconforming restaurant, even though the restaurant would be less obnoxious and in all ways more in conformity with the applicable zoning ordinance, because that owner had no reasonable, investment-backed expectation in a restaurant when the zoning ordinance was enacted. Thus, it would seem that the owner of a structure does not have a reasonable, investment-backed expectation in a substantially changed structure, even if that structure is substantially changed in a way that better complies with the ordinance.

So, the question is, would state law allow a property owner to make such a change to a structure and retain the nonconforming status?

Any suggestions would be appreciated.

Jeffrey Belanger
Planning and Community Development
City of Manchester
(603) 624-6450, ext. 5607
jbelanger@manchesternh.gov

Tue 4/28/2015 5:40 PM

The hypothetical fact pattern appears to assume that one intentionally wants to demolish a functioning existing structure and rebuild another, still non-conforming one, perhaps in a different location on the same lot.

Understanding that each town has its own zoning provisions re. non-conforming use and that inquiries as to changes to non-conforming uses are very fact-intensive, a municipality should consider whether

the property owner who has voluntarily demolished an entire structure is in any different situation than any other owner of property not containing such a structure. Overly generous reconstruction rights could unduly interfere with the rights and expectations of neighboring properties and render suspect the public purposes of the zoning ordinance.

Such treatment is entirely consistent with the oft-expressed policy of zoning that nonconforming uses are to be eliminated and not perpetuated indefinitely.

(The analysis would likely be different if a tree fell on a deck and the owner, who had intended to keep the deck indefinitely absent the damage, wanted to rebuild it at the same (or smaller, less nonconforming) size and in roughly the same location: an overly harsh application of the concept of "termination of non-conforming use" could be unfair to a property owner who is merely the victim of fate.)

Lynne Guimond Sabean, Esq.
Boutin & Altieri, P.L.L.C.
118 Main St., P.O. Box 1013, Meredith, NH 03253 (603)279-6192
1 Buttrick Rd., P.O. Box 1107, Londonderry, NH 03253 (603)432-9566
lsabean@boutinlaw.com

Tue 4/28/2015 11:13 PM

If within original footprint then should be allowed by right. Otherwise would require a variance. Fact of decreasing non-conformance should weigh heavily towards granting variance and once granted would have a right to continued existence similar to grandfathered non-conforming.

If variance not granted owner has continued right to maintain/repair/replace as is.

For a comparable situation consider RSA 483-B:11 apparently allowing expansion of non-conforming foot print within a shore land buffer zone so long as moving further away from shore.

John Segedy
segedy@gsinet.net

Wed 4/29/2015 11:08 AM

Thanks to everyone for your responses regarding my nonconforming-use question. Just to clarify, my question was just meant for the context of state law. Of course, municipalities may grant property owners more rights regarding nonconforming uses than the State grants, but that's a town-specific question. For what it's worth, the opinion that I came to was that there is no prohibition against a property owner exercising less rights than those to which he is entitled. If someone has a nonconforming deck that encroaches 20 feet into the setback and wants to take 5 feet off the deck for some reason, there's no prohibition against that. The same is true if the owner of a nonconforming restaurant wants to go from 10 tables down to 8. The reduction in intensity would not be a "substantial change" pursuant to the New London case.

This is distinguishable from changing the type of use to one that is less intense, like an industrial use to a commercial use. Even if the commercial use would be less offensive to the ordinance, and the neighbors, there is no right to the commercial use. The same is true for picking up a house that encroaches in a setback and moving it to encroach in another setback. That's a substantial change, rather than a simple reduction.

Jeffrey Belanger
Planning and Community Development
City of Manchester
(603) 624-6450, ext. 5607
jbelanger@manchesternh.gov